No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

MILTON KLEIN,
Director, Litigation Division,

DAVID LONDON,
Chief, Appellate Branch,

ABRAHAM H. MALLER,
Special Appellate Attorney,
Office of Price Administration,
Washington 25, D. C.

HERBERT H. BENT,
Regional Litigation Attorney,
Office of Price Administration,
San Francisco 3, California.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

ARGUMENT.

Appellant's argument may be summarized as follows: (1) an attack on the Administrator's right to bring this action; (2) that appellant's conduct was a sufficient compliance with the Act and the regulation; (3) that the Court's findings that the lathe was not rebuilt and that it was second hand are not supported by the evidence; and (4) that appellant's alleged good faith was material in the damage phase of the case.

We shall discuss these points in order.

I.

THE SALE OF THE LATHE WAS TO A PURCHASER FOR USE IN TRADE OR BUSINESS, AND, HENCE, THE ADMINISTRATOR HAD THE RIGHT OF ACTION. SINCE THIS WAS NOT A CONTESTED ISSUE, NO FINDING OF FACT WAS REQUIRED.

Specifications of Error 5 and 6 argued in Points B and C in appellant's brief are entirely lacking in merit. Appellant argues that the Administrator was not entitled to a judgment because there was a failure to produce any evidence, and the Court failed to make a finding that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

In making this argument appellant ignores the fact that this was not a disputed issue in the case. In Paragraph 4 of count 2 of the complaint, plaintiff alleged:

> "4. None of such purchases was made for use or consumption other than in the course of trade or business." (R. 3-4.)

Appellant's answer did not deny this allegation. There was, therefore, no necessity of the introduction of any evidence as to this matter. Rule 8(d) Federal Rules of Civil Procedure. Similarly, the lower Court was not required to make a specific finding of fact as to this phase of the case.[1]

---

[1]Actually, the lower Court recognized the fact that the sale was to a buyer for use or consumption in the course of trade or business. In Finding of Fact I, the Court found: "That the defendant, during the times mentioned in the complaint, was engaged in business * * * selling and offering to sell used machine tools to purchasers purchasing them in the course of trade or business." (R. 28.)

In *United States Trust Co. of N. Y. et al. v. Sears,* 29 Fed. Supp. 643 (D. Conn.), Circuit Judge Clark of the Second Circuit (acting as District Judge pursuant to statutory designation) said at page 645:

> "Since, therefore, all statements of fact made on behalf of either the plaintiffs or the defendants stand admitted in the documents on file, no formal findings of fact by the court are required. Rule 52(a) F. R. C. P."

Again, in *Matton Oil Transfer Corp. v. The Dynamic* (C.C.A. 2nd), 123 F. (2d) 999, the Court said at page 1001:

> "We agree fully with the spirit and the terms of the resolution passed by a majority of the judges at our Judicial Conference of last June recommending 'that the trial judge make brief, pertinent findings in respect to *contested* matters and file the same in connection with his opinion'. This puts the emphasis where it should be, namely, on brief and pertinent findings of *contested* matters * * *" (Emphasis supplied.)

This Court recognized generally this principle in *Fanchon & Marco, Inc. v. Hagenbeck-Wallace Shows Co.,* 125 F. (2d) 101, 104, when it held that no finding was required upon an issue excluded by a pre-trial order.

It is somewhat surprising that appellant should raise this issue, in view of the fact that the *evidence presented by him* clearly shows that the sale was to a purchaser for use in the course of business. Upon questioning by appellant's attorney, the buyer testified

that he operates a machine shop (R. 24) and that the machine was used by him after he obtained it. (R. 25.) It is well settled that a purchase of a commodity which the buyer intends to use or consume in his business is a purchase "for use or consumption * * * in the course of trade or business" within the meaning of Section 205(e) of the Act, so as to give the Administrator, only, the cause of action. The recent decision of this Court in *Bowles v. Trullinger,* 152 F. (2d) 191, is decisive of this point. There, this Court held that the purchase of a crawler-type tractor for use in the business of logging was a purchase for use in the course of trade or business. The Court reviewed a number of the authorities in support of this proposition and said at page 192:

> "* * * the right to recover statutory damages for violation of the Maximum Price Regulations in the case of industrial buyer or buyers in the course of trade or business was vested only in the Administrator. Non-commercial consumers are the only ones empowered by the Act to bring suit for overcharges."

Appellant relies upon *Bowles v. Whayne,* 60 Fed. Supp. 78, without, perhaps, realizing that the decision of the District Court was reversed by the Circuit Court of Appeals for the 6th Circuit on December 17, 1945, 152 F. (2d) 375. The opinion of the Circuit Court of Appeals is in accord with that of this Court in the *Trullinger* case and relies upon the same authorities.

II.

APPELLANT ADMITTEDLY DID NOT COMPLY WITH THE REGULATION.

Appellant's contentions that the purposes of the Act were fulfilled (Point A) and that the oral guarantee given to the purchaser was sufficient (Point E) are based upon a total disregard of both the Act and the regulation involved.

It is inconsistent to argue that the purposes of the Act have been fulfilled by conduct which is in clear violation of a regulation. The Emergency Price Control Act does not in itself fix maximum prices for commodities, but empowers the Administrator to issue regulations for that purpose. (Sec. 2.) Pursuant to that power, the Administrator issued Maximum Price Regulation No. 1, amended—Used Machine Tools, in which the Administrator established two general categories: machine tools sold as "rebuilt and guaranteed" and machine tools in "other condition". In each case, the maximum prices of the tools were fixed at a percentage of the price of the nearest equivalent new machine tool, depending upon the age of the machine tool. In the case of machine tools that were "rebuilt and guaranteed" within the definition of that phrase in the regulation, the percentages allowed as the maximum prices were considerably higher than those applicable to machine tools in "other condition".

In order to protect purchasers, the regulation provided certain requirements which a seller had to meet before he could sell a machine tool as "rebuilt and

guaranteed". These requirements are set forth in Section 3(c) and are as follows:

> "(c) *Meaning of the term 'rebuilt and guaranteed'.* A rebuilt machine tool is one in which worn or missing part have been replaced or reworked, and which has been tested under power so as to prove that it has a substantially equivalent performance to that of the machine when new. The term 'rebuilt and guaranteed' applies only to a machine tool which (1) has been rebuilt or is in equivalent condition to a rebuilt machine tool and is invoiced as such; (2) has been inspected, and tested under power so as to prove that it has a substantially equivalent performance to that of the machine when new; (3) carries a binding written guaranty of satisfactory performance for a period of not less than thirty days from date of shipment; *and* (4) is expressly invoiced as a rebuilt machine tool or its equivalent and as having been guaranteed for satisfactory operation for thirty days." (Italics in text.)

The regulation is clear and explicit. All requirements must be met by a seller, otherwise he cannot take advantage of the higher maximum price permitted for rebuilt and guaranteed machine tools. To permit a seller to substitute an oral guarantee for the written one, or to substitute his own conception of what would be "just as good" in lieu of any other specific requirement would lead to evasion of the regulation and destroy price control.

Appellant, admittedly, did not comply with the regulation. He did not give a "binding written guar-

antee". He did not invoice the machine tool "as a rebuilt machine tool or its equivalent and as having been guaranteed".[2] The appellant thus failed to meet two specific requirements.

III.

THE NECESSARY FINDINGS OF FACT ARE AMPLY SUPPORTED BY THE EVIDENCE.

In Point F, appellant contends that the portion of Finding of Fact V to the effect that the lathe was not rebuilt, and the statement in Finding of Fact III that the lathe was a second hand machine tool, are not supported by the evidence.

While the record is silent as to whether the lathe had been rebuilt, the Court's finding as to this issue, even though it is affirmatively unsupported by the evidence, does not prejudice the appellant. It may be considered as surplusage and disregarded. Under the regulation, even if the lathe had been a rebuilt machine, appellant was not entitled to sell it as a "rebuilt and guaranteed" machine tool unless he complied with the four requirements of the regulation, which we have previously discussed. That the lathe was a rebuilt machine would, if true, satisfy but one requirement. Appellant was still obliged to

---

[2]Appellant argues (brief, p. 15) that the regulation does not require the words "rebuilt and guaranteed" to be put on the purchase order. The record shows that appellants treated the purchase contract as the invoice. (R. 15.)

give the purchaser a binding written guarantee and was further obliged to invoice the lathe to the purchaser as a rebuilt machine and as having been guaranteed. Since appellant failed to comply with the regulation in these respects, he was not entitled to the "rebuilt and guaranteed" price. Even if the lathe was a rebuilt machine, and there is no proof that it was, it was not a rebuilt and guaranteed machine within the meaning of the regulation. If the machine were in fact rebuilt, it is reasonable to assume that defendant would have offered to prove it to show good faith and non-wilfulness in order to reduce the damages under Section 205(e).

The finding that the lathe was a second hand machine tool, is fully supported by the record. Appellant testified that he computed the price by placing the lathe in Class 4, which under the regulation is the class for machine tools built before January 1, 1920. (Table in Sec. 3(a) of MPR 1, as amended.) He testified that he did not know the exact age; that it could be "anything from 15 to 25 years". (R. 18-19.) Surely, it would be quite a stretch of the imagination in these days of extreme shortage of commodities to conclude that a machine of that age was anything but second hand. Moreover, if the machine were a new one, it is inconceivable that appellant would have sold it as second hand and determined its price on that basis. In view of the foregoing, it was hardly necessary that a witness testify in so many words that the lathe was a second hand machine. The finding of the Court was fully supported by the evidence.

IV.

GOOD FAITH IS NOT A DEFENSE TO THE ACTION.

In Point D, appellant argues that he showed the utmost good faith, and while he concedes that good faith is not an issue, contends that good faith should be material in this case.

First it should be noted that the findings cited by appellant do not support his contention of good faith. The effect of the findings quoted merely show that appellant did not violate the regulations, *except as to sale of the lathe.* Nor does Finding XIII aid the appellant. By it the Court found that *since the violation in question,* appellant has undertaken to comply with the regulation. Surely, that does not indicate that appellant acted in good faith *at the time that the violation occurred.*

Furthermore, good faith does not constitute a defense to an action for damages for a violation. Good faith, i.e., lack of wilfulness in violating, when coupled with the taking of practicable precautions against the occurrence of a violation will operate to reduce damages to the amount of the overcharge. (Section 205(e).) However, even where both of these elements are proved, there must be an assessment of at least single damages. They do not constitute a defense to the action.

In *Bowles v. Franceschini* (C.C.A. 1), 145 F. (2d) 510, the Court said at page 514:

> "It seems clear from the unqualified language of the Act that good faith alone is not a sufficient

> defense under § 108(b). Not only must the defendant show that the violations were not 'wilful' he must also show that he took 'practicable precautions' to avoid violating the regulations before he is entitled to the benefits of the reduction in damages."

To the same effect is *Bowles v. Hasting* (C.C.A. 5), 146 F. (2d) 94. See also *Bowles v. Indianapolis Glove Co.* (C.C.A. 7), 150 F. (2d) 597, 600.[3]

While we have discussed the effect of the proviso defense created by Section 205(e) as amended, it would be noted that the amount of the damages assessed is not a proper issue upon this appeal. The defense must be pleaded and proved by the defendant, *Bowles v. Glick Bros. Lumber Co.* (C.C.A. 9), 146 F. (2d) 566, 571-2. Appellant did not plead this defense in his answer. While the statute makes the assessment of damages between the amount of the overcharge and three times the overcharge discretionary with the trial Court, appellant does not complain of an abuse of the discretion by the lower Court.

---

[3]Even prior to the amendment of Section 205(e) by Section 108(b) of the Stabilization Extension Act of 1944, when the assessment of treble damages was mandatory, good faith was not a defense. *Bowles v. American Stores, Inc.* (App. D.C.), 139 Fed. (2d) 377, cert. den. 64 S. Ct. 947.

CONCLUSION.

We, therefore, respectfully submit that the judgment of the lower Court is correct and should be affirmed.

Dated, April 29, 1946.

Respectfully submitted,

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

MILTON KLEIN,
Director, Litigation Division,

DAVID LONDON,
Chief, Appellate Branch,

ABRAHAM H. MALLER,
Special Appellate Attorney,
Office of Price Administration,
Washington 25, D. C.

HERBERT H. BENT,
Regional Litigation Attorney,
Office of Price Administration,
San Francisco 3, California.